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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 391

GEORGE B. PARR, D. C. CHAPA, B. F. (TOM) DONALD, JR., JESUS G. GARZA, SANTIAGO GARCIA, OCTAVIO SAENZ, JESUS OLIVEIRA, O. P. CARRILLO, OSCAR CARRILLO, SR., TEXAS STATE BANK OF ALICE, ALICE, TEXAS, and SAN DIEGO STATE BANK, SAN DIEGO, TEXAS, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on April 6, 1959.

OPINIONS BELOW

The opinion of the Court of Appeals, printed in Appendix A hereto, *infra*, p. 1a, is reported in 265 F. 2d 894. The opinion of the Court of Appeals denying

the petition for rehearing, printed in Appendix C, hereto, *infra*, p. 21a, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 6, 1959. R. XVI, 5481, p. 20a, *infra*. Rehearing was denied on August 12, 1959. R. XVI, 5944, p. 23a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court erred in holding that it had no power to grant petitioners' motion for inspection of grand jury testimony of a key Government witness, and in failing to exercise its discretion.

2. Alternatively, whether, if the District Court did exercise its discretion, the denial of petitioners' motion for inspection of grand jury minutes constituted an abuse of discretion.

3. Whether defendants in a criminal case met this Court's requirement of showing a "particularized need" for access to relevant portions of the transcript of a prosecution witness' testimony before the grand jury, where

(a) the witness, an accomplice and co-conspirator, was the principal prosecution witness; his testimony occupied 23 per cent of the record;

(b) the witness was shown to have made numerous statements, some under oath, including oral testimony, inconsistent with, and contradictory to, his testimony at the trial;

(c) the witness admitted that he had deliberately sworn falsely in affidavits to agents of the FBI relating to one of the petitioners;

(d) the witness had not been indicted but still faced the threat or possibility of prosecution if he did not testify favorably to the Government;

(e) the Court of Appeals, upon reading the record, said that the jury could have found the witness' testimony "far from trustworthy."

4. Whether a federal court has jurisdiction under the Mail Fraud Statute to try a case involving a state offense of embezzlement of local school funds by members of a local district school board and others, where the only use of the mails was the giving of information and collection of taxes by the board pursuant to its statutory duty.

STATUTES INVOLVED

The statutes involved are Rule 6(e) of the Federal Rules of Criminal Procedure, the Mail Fraud Statute, 62 Stat. 763, as amended, 63 Stat. 94, 18 U.S.C. Sec. 1341, the Conspiracy Statute, 62 Stat. 701, 18 U.S.C. Sec. 371, and the Principals Statute, 62 Stat. 684, 18 U.S.C. Sec. 2. The Mail Fraud Statute is printed in Appendix E, *infra*.

STATEMENT OF THE CASE

Petitioners were convicted of violating the Federal Mail Fraud Statute, 18 U.S.C. Sec. 1341, and the Conspiracy Statute, 18 U.S.C. Sec. 371. The trial which resulted in their conviction in 1957 was preceded by an earlier trial in 1956 which ended in verdicts of acquittal as to certain petitioners with respect to some counts, and a mistrial as to the remaining counts for

these petitioners and as to all counts with respect to all other petitioners. Both trials involved voluminous testimony which need not be detailed here.

The petitioners were convicted on the basis of an indictment charging that they had collaborated in a scheme to convert to their own use funds belonging to the Benavides Independent School District and to have used the mails in furtherance of said scheme. The scheme allegedly consisted of the embezzlement of School District funds by the drawing of fraudulent checks on the District's bank account, such checks being sometimes drawn to fictitious payees and sometimes to real persons in payment for fictitious services or goods. The alleged use of the mails consisted of the giving of information and collection of taxes by the School District. The material "caused to be placed" in the mails consisted of checks deposited in the mail by taxpayers. The material "caused to be taken" from the mails consisted of information and notices sent to taxpayers by employees of the School District.

The principal prosecution witness was one Diego Heras, who was named as a co-conspirator in the indictment (R. I, 27) and was an accomplice, as the court recognized (R. XV, 5493). His testimony covered 1,008 printed pages, or approximately 23% of the record. He testified, *inter alia,* that he worked for the School District during most of the period of the alleged scheme, and wrote checks to fictitious persons and gave cash to various petitioners, all from District funds. His testimony, if believed, furnished most of the factual elements necessary to convict the petitioners.

At the beginning of Heras' direct examination, the defense made a request, in general terms, for permis-

sion to inspect prior statements and testimony by Heras. The defense said it was seeking all material in the control or possession of the Government "by this witness touching the subject matter of his testimony at this trial, so that we may ask for an order of the Court to produce for our inspection those relevant statements or reports." (R. VII, 2284-2285).

At the suggestion of the prosecution, a ruling on this request was deferred until the end of Heras' direct examination (R. VII, 2289-2290 and 2318). At that time, the defense was able to obtain from the prosecution various statements of Heras other than his testimony before the grand jury (R. VIII, 2429-2437). Defense counsel then requested the Court to grant access to Heras' testimony before the federal grand jury (R. VIII, 2441). The colloquy between defense counsel, the United States attorney and the Court on this subject was as follows (R. VIII, 2441-2442):

"Mr. Foreman: May it please the Court, the first further request we have is for the testimony of this witness before the Federal grand jury.

"Mr. Wilkey: Your Honor, it is the Government's position that that is not covered by the Jencks opinion.

"The Court: That is the opinion of the Court. I don't know what the Supreme Court may say about it. Has the Supreme Court said anything about it?

"Mr. Foreman: Not that I know of. I was—

"The Court: This Court will deny that request.

"Mr. Foreman: We would like to establish the fact that he does have this testimony and has it in the courtroom and had it prior to the time the trial started.

"Mr. Wilkey: I do not have it in the courtroom, and it is in my office, and until it is—

"The Court: It is my opinion it is privileged, and secret, and I will rule, subject to all risks, that you cannot have it."

The defendants' motion for access to Heras' testimony and the trial court's ruling were made after this Court decided *Jencks* v. *United States*, 353 U.S. 657, and before the decision in *United States* v. *Proctor & Gamble*, 356 U.S. 677.

Some eleven days after such ruling and after the completion of Heras' testimony, the Government called the witness William Marvin Benson to the stand and the question of granting access to grand jury minutes was renewed (R. X, 3291). Government counsel agreed to furnish statements of the witness before his cross-examination began (R. X, 3291), but concerning federal grand jury testimony made the following statement:

"However, in regard to the federal grand jury testimony, that is privileged and we decline to furnish that transcript of information." (R. X, 3293)

The trial court sustained the Government's position (R. X, 3292).

Still later, near the end of the direct examination of Benson, the question of access to grand jury minutes was again raised and the trial judge refused to change his ruling although it was reiterated that the United States Attorney had a transcript of Heras' testimony before the federal grand jury which returned the indictment in this case (R. X, 3334-3336).

Heras had previously testified at the first trial of this case in 1956, in at least two state court trials involving the petitioners Parr and Donald in 1956 and 1957 (R. IX, 3005), and in 1953 and 1954 before the Duval County grand jury (R. IX, 2924-2925). This body was investigating the Benavides Independent School District and petitioners. See *Adame* v. *State*, 283 S.W. (2d) 223, 226 (Tex. Crim. App. 1955), which held the Duval County grand jury to be illegally constituted.

Heras had also made numerous statements, some under oath, to investigating officers (R. VIII, 2429-2437). There was evidence that he had previously lied under oath with respect to the subject matter of his testimony at the trial and particularly concerning petitioner George Parr. For example, in April 1953 he had made a sworn statement to the FBI concerning the petitioner George Parr (R. IX, 3173), and two days later made a second sworn statement to the FBI declaring that the statements in the earlier affidavit "were false and untrue and I knew them to be untrue at the time." (R. IX, 3178).

On cross-examination it was demonstrated that there were numerous inconsistencies between Heras' testimony at the trial and his previous statements and testimony. The Court of Appeals itself noted that "some inconsistencies and discrepancies were admitted by Heras, including an admission that he had sworn falsely in previous affidavits." (*infra*, p. 14a). And the Court of Appeals commented, "The jury could have believed both that Heras had feathered his own nest at the expense of the board and that his testimony was far from trustworthy." (*infra*, pp. 5a-6a).

All of the petitioners were convicted and sentenced. Defendant Parr was sentenced to ten years in prison and to pay a fine of $20,000; the other defendants received lesser sentences.

On appeal the Court of Appeals affirmed, holding that petitioners had been properly convicted under the Mail Fraud Statute and the Conspiracy Statute. On the grand jury question, the Court held: (1) that petitioners had no right to see a transcript of Heras' testimony; (2) that the trial court could have refused to grant access to the transcripts in its discretion on either of two grounds (a) because even if Heras' grand jury testimony contained contradictions, this evidence might well have been found by the trial judge to be merely cumulative, or (b) because of the possibility that Heras might be called to testify before a future grand jury if the present indictment had been dismissed.

The Court of Appeals entertained a motion for rehearing after this Court's decision in *Pittsburgh Plate Glass Co.* v. *United States*, 79 S. Ct. 1237, and on August 12, 1959 denied the motion (*infra*, pp. 21a-22a). This petition for certiorari follows that denial.

REASONS FOR GRANTING THE WRIT

A. Access to Grand Jury Transcripts

1. In *United States* v. *Procter & Gamble*, 356 U.S. 677, and *Pittsburgh Plate Glass Co.* v. *United States*, 79 S. Ct. 1237, this Court held that trial courts have discretion to grant defendants access to grand jury testimony where a "particularized need" is shown. In neither of these cases did the Court define the kind of showing which would be deemed sufficient to entitle

a defendant to inspection. This case presents that important question for the first time.

In *Pittsburgh Plate Glass* the defense sought the grand jury testimony of an "important" prosecution witness, but supported its motion by nothing aside from the bare fact that the witness had testified before the grand jury. The Court held that "petitioners failed to show *any need whatever* for the testimony of the witness Jonas." 79 S.Ct. 1237, 1241. (Emphasis supplied.)

In the present case, the showing of need for access to the grand jury testimony of the witness Heras may be summarized as follows:

(1) Heras was the principal prosecution witness;

(2) Heras had testified before the grand jury which indicted the petitioners (R. VII, 2313; VIII, 2441);

(3) Heras admitted that he had knowingly made false statements, in writing and under oath, concerning the petitioner, Parr (R. IX, 3173-3178);

(4) Aside from the statements just mentioned, there were numerous discrepancies and contradictions between Heras' testimony at the trial and his previous statements and testimony concerning the subject matter of the case (R. VIII, 2529-2530; R. IX, 2888-2890; VIII, 2591-2592);

(5) Heras had made statements before a state grand jury which conflicted with his testimony at the trial (R. VIII, 2634-2636, 2657);

(6) Heras was an accomplice and was named in the indictment as a co-conspirator (R. I, 27). Heras had not been indicted up to the time of the trial

(R. X, 3285). He was still subject to the threat of prosecution and may have believed that it was to his interest to testify in support of the prosecution.

In summary, the record raised the strongest possible presumption—indeed, an inescapable conclusion—that if the petitioners were allowed to inspect Heras' grand jury testimony, they would find statements contradicting his trial testimony which could be used to impeach him. The petitioners showed not only that Heras was untrustworthy; they showed specifically that, both prior to and after the time he testified before the federal grand jury, Heras made false or contradictory statements relevant to his testimony at the trial. The only conceivable additional showing would have been direct proof that the grand jury testimony itself contained contradictions—proof that petitioners or the trial court had no way of obtaining without inspection. This Court has said that "[s]uch a preliminary showing would not of course, be necessary." *Pittsburg Plate Glass Co.* v. *United States, supra,* at 1241.

2. In *Pittsburgh Plate Glass* this Court also held that when defendants show a "particularized need" for access to grand jury transcripts, it becomes the trial judge's duty to grant such a motion in the exercise of his discretion. In that case the trial judge denied the motion because no need was shown. Here, however, the judge held that he had no discretion to grant access regardless of whether or not any need was demonstrated. The Court of Appeals sustained his action on grounds which were neither considered nor advanced by the trial judge, and which, in any event, would have been insufficient, as we shall show.

As the record shows, the petitioners made their motion for inspection of the grand jury testimony of Heras and then proceeded to attempt to establish that the testimony was in the prosecution's possession. At this point the court intervened in the colloquy and cut off further proceedings on the subject, saying:

> "It is my opinion it is privileged, and secret, and I will rule, subject to all risks, that you cannot have it." (R. VIII, 2442)

In short the court held that it had no *power* to grant the motion. It failed to exercise discretion at all, and did not consider the overwhelming facts establishing the "particularized need" demonstrated by the record. The court declared that it would deny access regardless of what petitioners could show—"subject to all risks." The court thus held, in absolute terms, that the testimony was "privileged," and there was nothing more petitioners could do except appeal. This absolute refusal is in square conflict with this Court's position, long held, that "disclosure is wholly proper when the ends of justice require it." *United States* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 234, and with this Court's recent opinions (decided after the trial judge's ruling) in *Pittsburgh Plate Glass Co.* v. *United States, supra,* and *United States* v. *Procter & Gamble, supra.*

3. Nor could denial of access in this situation have been sustained even if it had resulted from an exercise of discretion. The very strong showing of need for Heras' testimony in the present record, including a showing of untrustworthiness and perjury with respect to the instant case, gave petitioners a right to access here, and denial would have been an abuse of discretion.

It is well settled that the government has the right to use grand jury testimony in appropriate circumstances. For example, *United States* v. *Socony Vacuum Oil Co., supra* at 233-234, sustains the use of grand jury testimony by the prosecution to refresh recalcitrant witnesses' recollections and *United States* v. *Cotter*, 60 F. 2d 689 (2d Cir. 1932), upholds its use by the prosecution for impeachment. It is equally well settled that the defense has the right to use grand jury transcripts for impeachment where it can show contradictions between the grand jury testimony and the witness' testimony at the trial. *United States* v. *H.J.K. Theater Corp.*, 236 F. 2d 502, 507 (2d Cir. 1956), states:

> "However, where, as here, it is shown *or alleged* that the trial testimony of a witness against the defendant is contradictory of the witness' testimony before a Grand Jury, the rule in this circuit is that the defendant *must* be permitted to use the contradictory Grand Jury testimony to impeach the witness." (Emphasis supplied.)

See also *United States* v. *Alper*, 156 F. 2d 222 (2d Cir. 1946); *Burton* v. *United States*, 175 F. 2d 960 (5th Cir. 1949). This right of the defense is essential if the prosecution and the defense are to stand on equal terms at the trial.

What should be deemed an adequate defense showing as to contradiction? This Court has held, as already noted, that the defense need not make an actual showing of contradiction before it is entitled to access. Plainly, the defense need only show probability.

Here the petitioners made the strongest possible showing that the transcripts would reveal such contradictions. Their right to access was clear once such a

showing was made. Denial of access despite such a showing was an abuse of discretion—as much so as if direct contradiction were shown.

4. The Court of Appeals held that the trial court could have denied access to Heras' grand jury testimony, in its discretion, for two reasons: (a) because it might have considered that the grand jury transcripts, even if they revealed contradictions, would provide merely "cumulative" evidence for impeachment, and (2) because the court might have feared that Heras' free and untrammeled testimony before future grand juries would be rendered unavailable. The Court of Appeals' holding on these points would establish an erroneous precedent in conflict with the principles laid down by this Court to govern the production of grand jury transcripts.

It would be mischievous indeed if trial courts were to deny access to transcripts on the ground that this unknown evidence would merely be cumulative—especially if the trial court, as here, does not inspect the transcripts before ruling. The process of impeachment, based on substantial and not frivolous grounds, may not be restricted by blocking out an entire area of material which could be fruitful for further impeachment of the key prosecution witness.

For example: the record proved that Heras had testified falsely with respect to certain material facts. This proof would normally seem to *invite inquiry* as to whether he had or had not testified falsely as to other issues. But the Court of Appeals held that proof of false testimony is a valid reason *for denying* an opportunity to prove that the witness told other and additional lies under oath!

In the present case it appears probable that the jury believed Heras, despite the self-contradictions petitioners were able to show. It is entirely possible that access to Heras' grand jury testimony would have enabled petitioners to establish that he testified falsely on certain issues which were crucial in the minds of the jury. Further, the very fact, if proved, that Heras lied before the grand jury in this case might have made the crucial difference in the minds of the jury. Demonstrated lies before the very body that indicted the petitioners might well carry greater weight than statements in any other circumstances, and the contradictions might have involved aspects of the case more striking to the jury. In any event, trial courts should not be in the untenable position of speculating as to whether evidence might or might not have a particular effect on a jury. The defense should not be denied an opportunity to use grand jury transcripts for impeachment when, as here, there are reasonable grounds to believe that access to the transcripts might demolish completely the credibility of the chief prosecution witness and attack essential elements of his testimony.

Nor could denial of the transcripts here properly be premised on the possibility that Heras might again be called upon to testify before a grand jury, and this time, as a consequence of disclosure of his earlier testimony, prove a reluctant witness. In the first place, this requires the assumption that there is such a substantial public interest in preserving the availability of this witness, despite the proof of his perjury, as to deny the defense an opportunity to lay bare *all* of the matters as to which he gave perjurious testimony. In the second place, Heras' testimony on these matters had already been disclosed—albeit in differing and

conflicting versions. He had testified in public concerning the instant case at prior federal and state court trials and before a state court grand jury. It seems absurd to suggest that turning over one more and perhaps a different version of the same scenario would make the witness reluctant in the future, and that this is a reason for denying access to his grand jury testimony. Such an apprehension, if valid, would justify denial of access in nearly every case.

Moreover, the record shows that none of the traditional reasons for secrecy of grand jury proceedings as set forth in *United States* v. *Procter & Gamble, supra,* is applicable in this case. The indictment was returned on March 6, 1956, some fifteen months before petitioners requested access to available grand jury transcripts at the last trial. The grand jury had long since completed its function, the petitioners had made bond and had appeared on four occasions in 1956 and 1957 when the various trials were begun. Therefore, there was no question of preventing the escape of persons whose indictment was contemplated. The utmost freedom of the grand jury in its deliberations had been insured and tampering with witnesses before the grand jury or subornation of perjury would not have been possible. Furthermore, all of the key government witnesses had testified at the first trial of this case in 1956. There was no question of discouragement of free and untrammeled disclosure by persons having information concerning commission of crime. Also, there was no question of maintaining secrecy for the purpose of protecting an accused who had been exonerated.

The record affirmatively shows that the traditional grounds for secrecy of grand jury proceedings as set forth in *United States* v. *Procter & Gamble, supra,* do

not exist in this case and disclosure could not properly be denied under these criteria.

5. This case raises a fundamental issue of fairness between prosecution and defense in a criminal trial. If the present decision is allowed to stand as a precedent, it will in practical terms mean that defendants cannot get access to grand jury transcripts unless they can show that the transcripts actually do contain contradictions and that these contradictions, if used, would have a decisive effect on the jury. This would be an impossible burden. In practical terms this procedure would give the prosecution the exclusive use of grand jury testimony while denying it to defendants, for rarely, if ever, would it be possible for a defendant to make a more formidable showing of *probable* contradiction and "particularized need" than is found in the record of the present case. Few, if any, defendants will ever be able to offer the quality of proof of untrustworthiness and probable contradiction shown here. If petitioners' showing was insufficient, then "particularized need" will become a will-o-the-wisp which no defendant will ever be able to grasp. Review of this case is vitally necessary to aid the lower courts in coming to an understanding of the proper interpretation of that standard.

B. Applicability of the Mail Fraud Statute

The final question relates to the potential of a vast extension of federal jurisdiction over criminal offenses of purely state or local concern. The holding here gives the Mail Fraud Statute such a broad scope that the state crime of embezzlement is in effect made a federal offense.

The use of the mails in this case had nothing to do with any scheme of embezzlement. The only relationship between the use of the mails and a scheme to defraud is that some of the funds from which the embezzlement took place were collected through a wholly proper and lawful use of the mails. The giving of information and the receipt by mail of a portion of the tax collections, an entirely lawful transaction, all occurred prior to the embezzlements. This is clear from the indictment; it is equally clear from the petitioners' requested instruction which the court refused and which reads as follows:

> "You are further instructed if you believe that the alleged scheme and artifice to defraud or to obtain money and property as is set out in each of the first 19 counts of the indictment, amounted to no more than a plan to convert money from the Benavides Independent School District after it had first been collected and receipted for by the proper use of the United States mails, or if you have a reasonable doubt in regard thereto, then you will find the defendants 'Not Guilty' as to each of the first 19 counts of the indictment." (Defendants' Requested Charge No. 27 (R. XV, 5378))

This charge would have informed the jury that the use of the mails must be an incident to a general scheme for embezzlement, and not a lawful prior transaction, in order to constitute a mail fraud violation. By failing to dismiss the indictment and by refusing this charge, the trial court in effect held that any state crime involving embezzlement becomes a federal offense if the mails are utilized as an instrument for the collection of money for a legally authorized purpose.[1]

[1] Cf. *Pereira* v. *United States*, 347 U. S. 1, wherein the use of the mails was established as an essential part of a scheme to defraud.

If by this device federal courts can thus obtain jurisdiction over local offenders, then it appears there is no limit to the number and character of local offenses which could be swept into the orbit of federal prosecution.

The dangers of this vast invasion by federal courts in the area of local offenses has been pointed out by four members of this Court in the dissent in *Rutkin* v. *United States*, 343 U.S. 130, 139. There the person who extorted money was held guilty of income tax evasion because he did not report it. In his dissenting opinion Mr. Justice Black said (343 U.S. 130, 141-143):

> "Insofar as the United States is concerned, many think that taking over enforcement of local criminal laws lowers the prestige of the federal system of justice. It certainly tends to make the federal system top-heavy. Of supreme importance is the fact that the United States cannot perform the monumental tasks which lie beyond state power if the time, energy and funds of federal institutions are expended in the field of state criminal law enforcement.
>
> "Federal encroachment upon local criminal jurisdiction can also be very injurious to the states. Extortion, robbery, embezzlement and offenses of that nature are traditionally matters of local concern. The precise elements of these offenses as well as the problems underlying them vary from state to state. Federal assumption of the job of enforcing these laws must of necessity tend to free the states from a sense of responsibility for their own local conditions. Even when states attempt to play their traditional role in the field of law enforcement, the overriding federal authority forces them to surrender control over the manner and policy of construing and applying their own laws. State courts not only lose control over the inter-

> pretation of their own laws, but also are deprived of the chance to use the discretion vested in them by state legislatures to impose sentences in accordance with local ideas. Moreover, state prosecutors are deprived of the all-important function of deciding what local offenders should be prosecuted. Final authority to make these important decisions becomes located in the distant city of Washington, D.C. . Here, as elsewhere, too many cooks may spoil the broth."

This quotation is from a dissenting opinion in a case where the Court divided five to four. But we submit, however, that even that majority's reasoning would not support the conclusion that the Mail Fraud Statute could apply to the circumstances of the petitioners' case. In *Rutkin* the Government had a legitimate financial interest in collecting taxes on funds derived from extortion, because in a real sense as opposed to a legal sense, such funds are certainly income to the extortioner. Furthermore, only in the event that the extortioner did not pay taxes would the Government take jurisdiction over the local offense.

But the United States should have no conceivable interest in embezzlement or fraud in violation of local statutes which justifies the federal prosecution of such offenses under the Mail Fraud Statute. We suggest that had Congress realized that the Mail Fraud Statute might give the Government vast power over all such local offenses, the act might never have been passed. It is *not* unreasonable to say that Congress intended to tax all income including the income of the criminal. It is unreasonable to say that Congress intended to make it a federal crime to use the mails legitimately for the purpose of giving of information and collect-

ing taxes if the sender of the bills, after exercising his contractual or legal duty, subsequently embezzles funds lawfully in his possession and collected by lawful means.

As was said in the only other case in which this novel contention was advanced by the Government, the case of *United States* v. *Beall*, 126 F. Supp. 363, 366 (N.D. Cal. 1954);

> "The use of the mails here was for a lawful purpose; that is, the fund raising campaign of the Infantile Paralysis Foundation. The facts alleged in the indictment are a far cry from the typical mail fraud case in which false representations are sent by mail or the proceeds of a fraudulent scheme are received through the mails."
>
> * * *
>
> "It is the opinion of this Court that the mail fraud statute was not meant to apply to persons who violate a position of trust and confidence by embezzling funds that come into their hands directed to organizations lawfully entitled to receive those funds through the mails, whether they be bank clerks, or receivers of charitable contributions, or others similarly situated."

This decision arose on a motion to dismiss the indictment and the court, relying substantially on the case of *Kann* v. *United States*, 323 U.S. 88, granted the motion. From this decision the United States took no appeal.

We submit the decision of the court below in petitioners' case is also in direct conflict with the case of *Kann* v. *United States, supra*. There this Court said (323 U.S. 88, 95):

> "The federal mail fraud statute does not purport to reach all frauds, but only those limited instances

in which the use of the mails is an integral part of the execution of the fraud, leaving all other cases to be dealt with by appropriate State law."

Four justices dissented in the *Kann* case in the belief that the mailing of the checks which distributed the illegally acquired funds was in fact a part of the scheme. But if in *Kann* the officers of the corporation had been indicted for mail fraud solely on the ground that they sent out corporation bills or collected funds as was their duty, it is conceivable that there would have been no dissent. Among the dissenters in the *Kann* case are the justices who concurred with Mr. Justice Black's opinion in the *Rutkin* case.

We submit, therefore, that to sanction the use of the Mail Fraud Statute as a device to prosecute an offense of purely local concern is contrary to the proper division of law enforcement responsibilities between the states and the Federal Government. Such an extension of the Mail Fraud Statute could result in consequences far reaching in nature. Federal prosecution officials could seek out areas of municipal corruption and the whole catalogue of criminal offenses confided exclusively to the states because every local activity undoubtedly utilizes the services of the United States Post Office Department. If such mere use of the mails invokes federal jurisdiction and responsibility for the detection and prosecution of unlawful activities, there appears no limitation to the scope of federal jurisdiction. We submit that it is important to the proper administration of criminal justice in the federal courts for this Court to define the appropriate limitations upon the use of the Mail Fraud Statute for the prosecution of state criminal offenses.

CONCLUSION

For the reasons given above, a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17071

GEORGE B. PARR, D. C. CHAPA, B. F. (TOM) DONALD, JR., JESUS G. GARZA, SANTIAGO GARCIA, OCTAVIO SAENZ, JESUS OLIVEIRA, O. P. CARRILLO, OSCAR CARRILLO, SR., TEXAS STATE BANK OF ALICE, ALICE, TEXAS, and SAN DIEGO STATE BANK, SAN DIEGO, TEXAS,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(April 6, 1959.)

Before TUTTLE, JONES and BROWN, Circuit Judges.

TUTTLE, Circuit Judge. Appellants were convicted of violating the United States Mail Fraud Statute, 18 U.S.C.A. § 1341.[1] This was the second trial under the indictment,

[1] § 1341. Frauds and swindles.

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, se-

the first having resulted in no convictions on any of the 20 counts, verdicts of acquittal as to two of the defendants on 19 out of 20 counts, verdicts of acquittal on several other counts as to several other defendants, and a mistrial as to the remaining defendants on all twenty counts. The 20th count was a conspiracy count.

This trial, vigorously contested, involving several weeks of testimony before the jury, produced 16 volumes of printed record, containing nearly 6,000 pages. The reiterated argument of counsel here that the record does not support the findings of the jury as to each of the defendants on each count included in the verdict has caused us to read carefully the extensive oral testimony in the case.

We can best state the case by briefly stating the facts upon which we conclude the jury could legally find all but two of the defendants guilty on counts 1-19. We shall thereafter discuss the legal points urged by appellants, some 30 in number.

Competent oral testimony and documentary evidence properly admitted on the trial would permit the jury to find the existence of the following scheme to defraud beginning in 1948 and concluding in 1954.

The Benevides Independent School District (hereafter B.I.S.D.) was a Texas school district that operated schools in the small Texas town of Benevides of several thousand

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curity, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." 18 U.S.C.A. § 1341.

population and for Freer, a town of approximately the same size. The population of Benevides was more than 90% of Latin derivation, whereas that of Freer was mostly, "Anglo," as the saying goes in Duval county in which both towns, as well as Alice, the county seat, were situated. The Texas law provided for a board of seven trustees to run the district. Actually a majority of four of Latin derivation lived in Benevides and three "Anglos" lived in Freer, and the seven rarely met as a board. Each group ran its own school and prepared its own budget which, when combined under the direction of the Benevides group, resulted in the district budget on which tax assessments and collections were made. The office of the district was, until July 1, 1951, outside of the district in the Parr Building, in the town of San Diego, the home town of defendant, George B. Parr. Parr was the principal stockholder and president of the Texas State Bank of Alice, the official depository for the school district, so designated by the Texas school authorities, and he was also president and principal stockholder of the San Diego State Bank, San Diego, Texas.

Among the other defendants was a majority of the Benevides trustees, Octavio Saenz, the president of the board, Jesus G. Garza and Santiago Garcia. Defendant Oscar Carrillo, Sr. was secretary of the board and D. C. Chapa was the board-appointed Tax Assessor and Collector. He was the father of board member Oscar Carrillo and of defendant O. P. Carrillo, who became the paid lawyer for the board. The difference in names is accounted for from the fact that Mr. D. Carrillo Chapa took to the name Chapa, whereas his sons preferred Carrillo. The defendant Jesus Oliveira was a director of the Texas State Bank of Alice, and, though not a bona fide employee of B.I.S.D., the recipient of substantial board funds paid to him at the rate of $100 per month. Defendant B. F. Donald was the cashier of the Texas State Bank of Alice, of which Parr was president.

The day to day work of the school district office was done by a group consisting of one W. M. Benson, the auditor, (until July, 1950,) and Diego Heras, bookkeeper and "acting" secretary, and several women clerks. There were offices for George B. Parr, Chapa, and for Oscar Carrillo, Sr., the secretary. Although Parr was not a member of the Board, he attended the principal meetings of the board and completely dominated its activities. After July 1, 1950, he personally countersigned substantially all the Board checks. He also controlled the Texas State Bank at Alice, the Board's depository and the San Diego State Bank which cashed many Board checks without endorsement. Under the direction of defendant Parr, Heras or Benson frequently made out checks on the B.I.S.D. account payable to non-existent persons[2] and to actual payees for work that was not performed. These checks were signed at different times by Saenz, D. C. Chapa, Heras (he signed none after July, 1951) and Oscar Carrillo, Sr. (after July, 1951), and, until July, 1950, were countersigned by Benson and thereafter by George B. Parr. During the years involved such proven checks amount to approximately $190,000. Many of these checks were cashed at the Alice State Bank by or at the express direction of Donald, without endorsement of the payee, and the cash proceeds were delivered to Parr and occasionally to Chapa. Others of the fraudulent checks (those made out to names similar to the names of relatives of defendants) were cashed by the payee and still others were cashed by some of the defendants upon forged endorsements.

With the exception of Jesus Oliveira and O. P. Carrillo, who were convicted on the conspiracy count only, and whose cases will be separately discussed, each of the individual defendants participated directly in the preparation and negotiation of the fraudulent checks or was a substantial beneficiary from the practice, or both. Proof was introduced from which the jury could find that the two,

[2] The interchangeability of the family names of persons of Latin descent made such manipulation hard for an outsider to detect.

Oliveira and Carrillo, were recipients of board money illegally.

The fraudulent scheme which the jury could find existed included the necessary steps of so keeping the board's records and so making its annual reports to the appropriate Texas school agency as to produce the board's annual share of state funds (approximately $140,000 per year) and included the necessary steps of assessing and collecting the taxes which the board had the legal power to levy. Thus enough money was collected to provide for the legitimate operation of the schools to the relative satisfaction of the school patrons, and enough additional was brought in to provide the funds to be looted.

An additional source of funds to the board tax assessor and collector Chapa, one of the most important figures in the scheme, was his billing of taxes to non-resident owners of mineral interests whose names did not appear on the tax rolls, and his personally cashing of the tax checks when received, at the San Diego State Bank, where the jury could believe his personal loans were credited with the proceeds.

The foregoing is the barest outline of the scheme which we have said the jury could find was concocted and participated in by all of the defendants, other than the two already mentioned, and of the evidence from which they also found that all were guilty of a conspiracy to do these acts. Counsel for the appellants, by the most vigorous cross-examination of Diego Heras, sought to show that he too profited by the scheme and that his testimony was in conflict with earlier sworn statements and testimony. The jury could have believed both that Heras had feathered his own nest at the expense of the board[3] and

[3] He admitted receiving large amounts of cash which he claimed represented "advances" of his salary or expense allowance. It was not disputed, however, that these "advances" greatly exceeded the salary in a given period and were never paid back in any substantial amount. It was also proved by Heras and Benson that much of this money was advanced on Parr's authority.

that his testimony was far from trustworthy. The fact that he also participated in the scheme and was an important actor in carrying it out, if he was, did not, of course, prevent the jury from believing his testimony, much of which was corroborated by other testimony and circumstances.[4] Benson's testimony was also attacked by appellants, since he was the countersigner of most of the fraudulent checks prior to July 1, 1950. The court charged that Heras was an accomplice as a matter of law, and that the jury could find Benson an accomplice on the record.

Of course, the weight to be attributed to the witnesses' testimony on such a trial is exclusively for the jury. We conclude that the evidence fully warranted the jury's findings that this group of defendants did concoct a scheme to take over the operation of the Benevides Independent School District and operate the schools in such a manner as to enable them to siphon off from the school funds brought in by their false representations to the state and their illegal[5] assessments and levies against taxpayers in excess of $200,000 for themselves.

The gist of a mail fraud case is the placing or causing something to be placed in the mails or taking or causing something to be taken from the mails "for the purpose of executing such scheme . . ." The jury could believe that the nineteen different deposits in, or takings of mail from, the United States mail in the Houston Division of the Southern District of Texas, occurred as testified. We

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[4] All but 23 cancelled B.I.S.D. checks for the actual period were destroyed or missing. Heras kept possession of 20 of these. The microfilm records of all transactions in the two Parr controlled banks mysteriously "disappeared" immediately following the start of the investigation by Federal authorities.

[5] The jury could find them to have been illegal because they were fixed in amount by the desire to build up the collections beyond the legal needs for operation.

discuss below the legal question as to the causal relationship of the appellants and the persons who thus used the mails and also the issue of wilfulness in connection with causation.

Appellants contend here that such a scheme, if proved, does not vest jurisdiction in the Federal courts under the mail fraud statute. They say that this was a public body authorized and obligated by law to assess property in the District for taxation and levy taxes thereon for the legal operation of the schools. They say that the mailings in counts 1 through 16 "were all for the legal purpose of paying taxes, giving notices of hearings of the Board of Equalization, or furnishing information to taxpayers [actually sending tax bills.]" If, they say, funds so received in lawful payment of taxes were misappropriated after receipt, the most that the Government has shown is a series of embezzlements. As to the mailing in counts 17, 18 and 19, they say that the Conoco monthly statements and the B.I.S.D. checks in payment thereof would all have been sent in the legitimate conduct of the Board's business even in the absence of a scheme to defraud.

The appellants do not take the extreme position that elected officials cannot be found guilty of mail fraud growing out of their use of the mails pursuant to devising a scheme to use the public funds for their own purposes. In light of the decisions of this Court in *Weiss* v. *United States*, 5 Cir., 122 F. 2d 675, certiorari denied, 314 U.S. 687; *Shushan* v. *United States*, 5 Cir., 117 F. 2d 931, certiorari denied, 319 U.S. 774, and others, such a position would of course be untenable. But they do take the position that, assuming that public officials have taken charge of a school board for the purpose of defrauding it of the money that comes to it from state appropriations and from taxes, and assuming there is ample proof that the money is being taken continuously over the years, and notwithstanding proof that substantially all tax renditions are made by mail, there is a lack of proof that the mailings

of the tax bills and the checks themselves were in furtherance of the scheme.

As pointed out by the government, this places them on the horns of a dilemma. By claiming that the mails are necessarily used in the lawful activities of B.J.S.D. they show that they must have contemplated that their fraudlent scheme of building up sufficient funds for the fraudulent purposes would necesassarily involve the use of the mails and thus bring them within the rule stated in *Pereira* v. *United States:*

> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used. United States v. Kenofsky, 243 U.S. 440." *Pereira* v. *United States*, 347 U.S. 1, 8-9.

We conclude that there was ample proof that the use of the mails was in furtherance of the scheme.

There is no merit to appellant's contention that the proof in the case conclusively showed that use of the mails *followed* the execution of the scheme to defraud as was held by the Supreme Court to be the case in *Kann* v. *United States*, 323 U.S. 88. The evidence which could be accepted by the jury as true showed a continuing scheme to maintain control over the finances of B.J.S.D. to make possible the continued collection of state funds and taxes and the illegal use of part of these funds for the benefit of the conspirators. There was ample basis for the jury to find that the use of the mails was in furtherance of the scheme and not after it had been fully effectuated.

Turning now to the conviction on the 20th count, the conspiracy count, appellants do not contend that there was insufficient evidence to support the jury's verdict as to the conspiracy if it be assumed that there was ample

evidence to support the findings on the first nineteen counts. Nor do they contend that, assuming that all the evidence properly admitted in proof of guilt of the other defendants on the first nineteen counts was also proper for consideration by the jury in testing the guilt of O. P. Carrillo and Jesus Oliveira under the conspiracy count, there was insufficient evidence to support the verdict against these two defendants on count 20.

This then causes us to consider the contention of appellant that the acquittal of these two defendants by a prior jury of all the nineteen substantive counts made improper the proof on this trial of their acts of illegally obtaining B.I.S.D. funds, which was charged as part of the nineteen counts.

The answer to this contention must be found in an understanding of the difference between an indictment for the doing of illegal acts on the one hand and an indictment for conspiring with others to do the same illegal acts on the other. It has long been held that an accused may be convicted and sentenced both for using the mails to defraud and for conspiring with others to use the mails to defraud, coupled with proof, of course, of the doing of a single act to effect the object of the conspiracy.

> ". . . . It is settled law in this country that the commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy is no defense to a conviction for both. See Pinkerton v. United States, 328 U.S. 640, 643-644, and cases cited therein." *Pereira* v. *United States*, 347 U.S. 1, 11.

If, as is the case, an accused can be made legally to suffer two sentences, one for commission of the substantive offense and one for conspiring with others to commit the same offense, then an acquittal of the charge on the substantive offense does not prevent a conviction for conspiracy to commit that offense unless the proof re-

quired to convict on the substantive charges is identical with that required to convict on the conspiracy count. *Pereira* v. *United States, supra.* The exceptional case is *Yawn* v. *United States*, 5 Cir., 244 F. 2d 235. In that case Yawn was charged with the offense of possessing an illegal still. He was also charged in a separate indictment with conspiracy to violate the liquor laws and one of the overt acts he was alleged to have committed to effect the conspiracy was that he possessed this same still. In the first trial the jury acquitted him of possessing the still. In the second trial the court admitted evidence of his possession of the still and permitted the issue to go to the jury as to whether he did possess the still as an act to effect the conspiracy. Although there were other overt acts alleged, the jury's finding of guilty on the conspiracy charge could have been based on a finding that he possessed the still, a fact which the jury had previously acquitted him on. We therefore reversed for a new trial.

It thus becomes necessary to determine here whether an acquittal of Carrillo and Oliveira of the substantive counts of this indictment is factually inconsistent with their subsequent conviction of the conspiracy charge. We think it quite clear that no such inconsistency exists.

To convict these two men on any of the substantive counts it was necessary that the Government prove that they participated in a plan to gain control over the school board, and that in pursuance of that plan they participated in the mailing of one or more of the letters specified in the nineteen counts. The jury may well have found an insufficiency of proof that they participated in the mailing of any of the items contained in the nineteen counts. The jury would thus be required to acquit them, as it did. In order for them to be convicted on the conspiracy count it would be necessary for the jury to find only that they, together with the other conspirators, conspired and agreed together to take over the affairs of the school board for the illegal purpose alleged and to

use the mails in the 19 stated particulars, and that, having so conspired, they participated in the doing of at least one of the overt acts alleged in the conspiracy count. These acts were entirely different, as to these defendants, from those charged in the first nineteen counts, for the court charged that they could not be convicted on a finding that they had committed one of the overt acts as to which they had been acquitted. It is clear that the elements of proof required to warrant a conviction under count 20 are thus quite different from those required to sustain a conviction under the substantive counts of the indictment.

Appellants make a further contention that even those appellants who were still triable on all 20 counts were prejudiced by the introduction of evidence as to the illegal conduct of O. P. Carrillo and Oliveira because this portrayed to the jury illegal acts of persons who had been fully acquitted of complicity in these actions. This argument is based on the theory, which we have rejected above, that these two defendaents could not legally be tried on count 20 following their acquittal on the substantive counts. Since we have rejected this contention it follows of course that there is no merit in the plea made on behalf of the other defendants. We conclude that neither *res judicata*, double jeopardy nor estoppel by judgment prevents the trial of these two defendants on count 20, notwithstanding their acquittal on counts 1 through 19, because, as we have already stated, the crime of conspiracy is a different crime and proof of its commission includes elements that were not resolved in favor of the accused on the earlier acquittal.

We next come to the contention variously urged by appellants, that the trial court permitted the conviction of appellants on an indictment which did not adequately charge wilfulness in the actions of the defendants and on a charge to the jury which did not accurately deal with the element of wilfulness.

The mail fraud statute provides that "whoever having devised or intended to devise any scheme or artifice to defraud . . . places in any post office . . . any matter . . . or takes or receives therefrom any such matter . . . shall be punished etc." The indictment in this case, after charging the alleged scheme or device, alleges that the "defendants *for the purpose of executing the aforesaid scheme and artifice* . . . caused to be taken from a post office," (emphasis added) or "caused to be placed in an authorized depository for mail matter," a letter, etc. Appellants argue that since the indictment does not expressly charge that the defendants *took* the letter from the post office or *placed* the letter in the authorized depository, but instead alleged that they *caused* the taking and the placing, the indictment is defective because it did not assert that these acts were "wilfully caused." It is their contention that since the Government did not charge that the defendants themselves did the act, the only way it could bring them within the terms of the criminal statute was by relying upon the provisions of 18 U.S.C.A. § 2(b). This section provides "whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal." Prior to the amendment of October 31, 1951, this section did not include the word "wilfully." As appellants point out, cases decided prior to that date do not deal with their contention here.

Appellants contend in effect that the omission of the word "wilfully" before the words "caused to be taken" and "caused to be placed" made the indictments defective. This same argument was advanced in the case of *Londos* v. *United States*, 5 Cir., 240 F. 2d 1, certiorari denied, 353 U.S. 949. The accused persons in that case were charged with violating the statute that says "whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered or counterfeited securities, knowing the same to have

been falsely made . . . shall be . . . punished." The indictment in that case did not charge that Londos himself transported the fraudulent security. It charged rather that Londos "did with unlawful and fraudulent intent, cause to be transported in foreign commerce, etc. . . ." We said there "a simple allegation that appellants caused to be transported a falsely made, forged, altered or counterfeited security in foreign commerce would not, of course, have been sufficient." But we then said:

> "Even if it were necessary for the Government to allege its case within the terms of 18 U.S.C.A. § 2(b), the allegations that appellants unlawfully and fraudulently caused the transportation is a sufficient allegation that they wilfully caused it."

So, too, as to the allegation that these defendants caused the letters to be taken from the post office "for the purpose of executing the aforesaid scheme and artifice." It is impossible to conceive of a person causing an act to be done *for the purpose* of executing a scheme or artifice as was charged in this indictment without its having been done wilfully. Purposefulness imports wilfulness. Wilfulness was adequately charged, sufficiently proved, and, we think, adequately discussed by the court in its charge to the jury. In fact the court expressly stated in its charge that the causing of the use of the mails by others must be shown to be wilful, and the court correctly defined the word "wilful."

The remaining substantial point raised by appellants that must be dealt with in light of the recently developed jurisprudence requiring disclosure to the defendant of written reports and statements made by Government witnesses as aids to impeachment is the contention that the court erred in not requiring the Government to deliver for the inspection of the accused persons a transcript of the grand jury proceedings so far as it disclosed testimony given by the witness Heras.

It was brought out on cross-examination of Heras that he had made numerous written statements to investigating officers, some under oath, that he had testified several times before state and federal grand juries; that he had testified in open court in the previous trials, including the first trial, of this same case. Numerous inconsistencies and contradictions between his testimony on the current trial and his prior statements and testimony were inquired into by appellants' counsel during nearly a week of cross-examination. Some inconsistencies and discrepancies were admitted by Heras, including an admission that he had sworn falsely in previous affidavits.

Appellants did not at any time request the trial court to make a preliminary inspection of the transcript to ascertain whether there was any inconsistency between Heras' testimony on the trial and his testimony before the grand jury. The trial court did not make such inspection. He merely denied the motion that it be made available to appellants on the ground of privilege and secrecy.

We think it quite clear that at the time this ruling was made the trial court's understanding of the law was justified by the decided cases. There is nothing in the Jencks case, *Jencks* v. *United States*, 353 U.S. 657, dealing with grand jury testimony and the statute subsequently enacted at 18 U.S.C.A. 3500 does not deal with it.

The Federal Rule touching on the subject of secrecy of grand jury proceedings is 6(e) F.R.Cr.P., which provides in material part:

> "(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when per-

> mitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. . . ."

It is thus clear that the trial court has the express power in a proper case to order grand jury proceedings to be disclosed. It is uniformly stated that secrecy is the general rule and variations from it the exception. In the last pronouncement of the Supreme Court on the subject, the Court said in a civil case in which a party sought the right to inspect grand jury records:

> "At the same time, we start with a long established policy that maintains the secrecy of the grand jury proceedings in the Federal Courts. See United States v. Johnston, 319 U.S. 503, 513; Costello v. United States, 350 U.S. 359, 362." *United States* v. *Proctor & Gamble*, 356 U.S. 677.[6]

All the case cited here both by appellants and the United States expressly or impliedly accept this thesis. This, then, must mean that an exercise of discretion must determine whether in a particular case such order should issue. Whether in a particular case such order should issue, traditionally, of course, it is the trial judge whose discretion is involved. We have so held in *United States* v. *Byoir*, 5 Cir., 147 F. 2d 336, 337.

It is clear that one of the exceptional cases in which the courts have usually held it appropriate to permit the inspection of limited parts of the grand jury testimony is one in which a defendant who is on trial for committing perjury *in his grand jury testimony* seeks to see the

[6] To be sure the Court also said: "We do not reach in this case problems concerning the use of the grand jury transcript at the trial to impeach a witness, to refresh his recollection, to test his credibility and the like [citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, and Cf. Jencks v. United States, 353 U.S. 657.] Those are cases of particularized need when the secrecy of the proceedings is lifted discreetly and limitedly."

transcript of his entire testimony. Such instances are *United States* v. *Rose*, 3 Cir., 215 F. 2d 617; *Alu* v. *United States*, 2 Cir., 246 F. 2d 29; *United States* v. *Remington*, 2 Cir., 191 F. 2d 246. This, of course, is not such a case.

The Court of Appeals for the Second Circuit has held that the proper procedure when such request is made for impeachment purposes is for the trial court to read the grand jury record touching the testimony in issue and determine whether there is a conflict, and if there is, to permit the defendant to use it for impeachment purposes. *United States* v. *H.J.K. Theatre Co.*, 2 Cir., 236 F. 2d 502. Even in such a case the court is permitted, in the exercise of a sound discretion to prevent merely cumulative impeachment, to limit such use, id. p. 508.

As is the posture of this case, the Court of Appeals for the Fourth Circuit noted in *Pittsburgh Plate Glass Company* v. *United States*, 4 Cir., ____ F. 2d ____, that the defendant there had not moved for the court to inspect the grand jury minutes, and if there was a conflict to make them available to defendant. The court noted that counsel demanded access to the transcript as a matter of right. That is the only motion made in the case before us. That court affirmed the trial court's refusal to make the transcript available. The court said:

> "After all, what we are dealing with is a problem of the fair scope of cros-examination, and the sound judicial discretion of the trial judge must be the chief guide. When the subject matter is one as delicate as grand jury testimony, no fixed rule can be formulated. The Judge should not be compelled to inspect in all cases; neither should he indiscriminately refuse, but he should exercise his judgment according to the circumstances. Certainly we could not approve any rule, such as contended for by the defendants here, requiring the automatic delivery of grand jury transcripts to defendants on demand."

This case and the companion case, *Galax Mirror Co., Inc.* and *Mt. Airy Mirror Co.* v. *United States*, are now before the Supreme Court for review, certiorari having been heretofore granted, ... U.S. .....

We think, however, that there was ample basis on the record before us here to warrant the trial court's refusal to grant the order even though on the record in the *Pittsburgh Plate Glass Co.* case the Supreme Court should find it was error to refuse the request. This assumes, of course, that the Court will not decide that in every case the defendant has the unqualified right to inspect the grand jury records and that there is no longer any discretion vested in the trial judge thereabout.

The defendant's counsel cross-examined witness Heras, whose grand jury testimony was requested, for five days. On the basis of prior statements furnished by government counsel under the Jencks rule and prior sworn testimony of Heras in earlier trials, counsel demonstrated to the satisfaction of the Court that Heras was an accomplice in the alleged offenses. The Court so charged the jury. Counsel also demonstated numerous inconsistencies in Heras' testimony and prior statements, and drew from him a concession that he had sworn falsely in a statement to the investigating agents. It may well be that the trial court considered that any additional inconsistent testimony that the grand jury transcript might show Heras had given would be merely cumulative in the same way the court thought the testimony would be cumulative in H.J.K. Theatre Co., *supra*.

Moreover, defendants largely pitched their defense on the basis of this being a fight between two political factions, implying that Heras was either personally, or as a tool for others, interested in sending the defendants, especially Parr, to jail in order to get him out of local politics. The evidence permitted the inference that the so-called Parr faction or party was an extremely powerful

influence in the county. There was also evidence from which the jury was permitted to find that evidence material to the case had been taken from the Parr dominated banks and destroyed by some of the defendants. One of the grounds of this appeal is that the indictments were defective and should be dismissed. So far as was apparent to the trial court it was not unlikely that Heras might again be called upon to testify before a grand jury inquiring into these same general allegations. This could certainly follow if we were to sustain appellant's attack on the present indictment. The court could well have apprehended that if the evidence introduced in this trial was believed by the jury, the free, untrammeled testimony of Heras might be made unavailable on any subsequent grand jury investigation, if his testimony before the grand jury should be subjected to the defendants' scrutiny.

Under all of these circumstances we think it quite clear that the generally recognized reasons for secrecy in grand jury proceedings, as mentioned with approval by the Supreme Court in *United States* v. *Proctor & Gamble, supra*,[7] apply with vigor in this case. At least we conclude that the trial court's denial of the motion on the

[7] The Court said in footnote 6, page 681:

"In United States v. Rose, 215 F. 2d 617, 628-629, those reasons were summarized as follows:

(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

grounds of privilege and secrecy was not an abuse of his discretion.

We have carefully considered appellants' other asserted grounds for reversal. We think that none of the asserted grounds, either failures to charge, denial of requested charges, the charge given, the refusal to grant a mistrial, constitute reversible error. Rulings of the court on the sufficiency of the indictment and other preliminary matters were not erroneous. From a reading of the record, it is amply apparent that during the course of this trial, lasting some six weeks, the issues were clearly and fairly presented to the jury.

The judgment is AFFIRMED.

APPENDIX B

Judgment

EXTRACT FROM THE MINUTES OF APRIL 6, 1959
IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 17071

GEORGE B. PARR, D. C. CHAPA, B. F. (TOM) DONALD, JR., JESUS G. GARZA, SANTIAGO GARCIA, OCTAVIO SAENZ, JESUS OLIVEIRA, O. P. CARRILLO, OSCAR CARRILLO, SR., TEXAS STATE BANK OF ALICE, ALICE, TEXAS, and SAN DIEGO STATE BANK, SAN DIEGO, TEXAS,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

* * * *

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17071

GEORGE B. PARR, D. C. CHAPA, B. F. (TOM) DONALD, JR., JESUS G. GARZA, SANTIAGO GARCIA, OCTAVIO SAENZ, JESUS OLIVEIRA, O. P. CARRILLO, OSCAR CARRILLO, SR., TEXAS STATE BANK OF ALICE, ALICE, TEXAS, and SAN DIEGO STATE BANK, SAN DIEGO, TEXAS,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Texas.

(August 12, 1959.)

ON PETITION FOR REHEARING

Before TUTTLE, JONES and BROWN, Circuit Judges.

PER CURIAM: The petition for rehearing filed within the extended time allowed by the Court, points out three incorrect factual statements in the opinion. None of these is material to the merits of the appeal or in any way affects the determination of the legal questions presented by it. Nevertheless, in order that the statement of facts may be as accurate as a brief statement of a 6,000 page

record permits, the following changes are made in the text of the opinion.

(1) On page 3 of the printed opinion, the word "as well as Alice, the county seat," are eliminated.

(2) On page 4 of the printed opinion the word "member" before the name Oscar Carrillo, Sr. is changed to read "secretary."

(3) On page 4 the sentence, "There were offices for George B. Parr, Chapa and for Oscar Carrillo, Sr., the secretary," is eliminated.

The petition for rehearing is DENIED.

APPENDIX D

Order Denying Rehearing

EXTRACT FROM THE MINUTES OF AUGUST 12, 1959
IN THE UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

No. 17071

GEORGE B. PARR, D. C. CHAPA, B. F. (TOM) DONALD, JR., JESUS G. GARZA, SANTIAGO GARCIA, OCTAVIO SAENZ, JESUS OLIVEIRA, O. P. CARRILLO, OSCAR CARRILLO, SR., TEXAS STATE BANK OF ALICE, ALICE, TEXAS, and SAN DIEGO STATE BANK, SAN DIEGO, TEXAS,

Appellants,

VERSUS

UNITED STATES OF AMERICA,

Appellee.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

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APPENDIX E

Mail Fraud Statute

(62 Stat. 763, 63 Stat. 94; 18 U.S.C. § 1341)

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.